

IN THE MISSOURI SUPREME COURT

NO. SC85215

STATE OF MISSOURI, ex rel. CHRISTIAN HOSPITAL NORTHEAST-
NORTHWEST and BJC HEALTH SYSTEM,

Relators,

v.

THE HONORABLE MARGARET M. NEILL, Circuit Court Judge,
22nd Judicial Circuit Court (St. Louis City),

Respondent.

PROCEEDING IN PROHIBITION
CIRCUIT COURT OF ST. LOUIS CITY CAUSE NO. 012-0315

REPLY BRIEF AND APPENDIX OF RELATORS

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REPLY TO RESPONDENT'S JURISDICTIONAL
STATEMENT AND STATEMENT OF FACTS

As an initial matter, it should be noted that Respondent's Jurisdictional Statement states that nothing in this case has changed from the time Relators filed their first Petition for Writ with this Court and the time the current Petition for Writ was filed. (Respondent's Brief, page 7). Respondent ignores, however, that after this Court denied Relators' Petition for Writ (Exhibit 20), Christian Hospital, on December 11, 2002, sought leave from Respondent to amend and supplement their initial venue transfer motion to assert venue was improper in the City of St. Louis based on §355.176.4 and to provide the court with the proof Respondent claimed she lacked (i.e., that Christian Hospital was a nonprofit corporation with its principal place of business in St. Louis County). (Exhibit 21). With the Motion for Leave, Christian Hospital submitted its Amended Motion to Transfer for Improper Venue, asserting §355.176.4 as the applicable venue statute and including affidavit support for the fact that Christian Hospital's principal place of business and the location of its registered agent were in St. Louis County. (Exhibit 21). On January 21, 2003, (again, after this Court denied Relators' previously filed Petition for Writ), Respondent issued her fourth order related to venue and denied Relators the opportunity to amend

and supplement their venue motions while implicitly having allowed Plaintiffs to file replies under Rule 51.045 out of time. (Exhibit 23). Thus, facts and circumstances in the case have changed since the filing of the original Petition for Writ.

As to Respondent's Statement of Facts, Respondent erroneously states that Respondent's February 18, 2002 ruling is not challenged in this proceeding. (Respondent's Brief, page 13). The Docket Sheet for this case shows that there was no ruling entered on February 18, 2002, but Relators believe Respondent was referring to her February 19, 2002 ruling. That ruling, which was Respondent's second venue order, denied Relators' motions to reconsider venue, stating that the motions were without merit, and denied Relators the opportunity to supplement the record. (Exhibit 17, pages 4-5). As such, said order is, in fact, challenged in this proceeding.

POINTS RELIED ON

I. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT (OR THE CURRENT PRESIDING JUDGE) FROM TAKING ANY FURTHER ACTION EXCEPT TRANSFERRING THIS ENTIRE CASE TO ST. LOUIS COUNTY BECAUSE RELATORS PROPERLY RAISED IMPROPER VENUE UNDER RULE 51.045 IN THAT: (1) RELATORS RAISED IMPROPER VENUE AT THE EARLIEST OPPORTUNITY, THEREBY PRESERVING THEIR OBJECTION; AND (2) RESPONDENT, AFTER IMPOSING ON RELATORS THE BURDEN OF DISPROVING THE BASIS FOR VENUE IN THE CITY OF ST. LOUIS, ERRED IN DENYING RELATORS THE OPPORTUNITY TO SUPPLEMENT THE RECORD IN SUPPORT OF THEIR VENUE TRANSFER MOTIONS.

State ex rel. Bierman v. Neill, 90 S.W.3d 464 (Mo. banc 2002)

Missouri Supreme Court Rule 51.045

II. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT (OR THE CURRENT PRESIDING JUDGE) FROM TAKING ANY FURTHER ACTION EXCEPT TRANSFERRING THIS ENTIRE CASE TO ST. LOUIS COUNTY BECAUSE RESPONDENT EXCEEDED HER JURISDICTION AND

ABUSED HER DISCRETION IN THAT SHE UNJUSTLY APPLIED
RULE 51.045 BY PERMITTING PLAINTIFFS TO FILE UNTIMELY
REPLIES TO RELATORS' VENUE TRANSFER MOTIONS WHILE AT
THE SAME TIME DENYING CHRISTIAN HOSPITAL THE
OPPORTUNITY TO AMEND ITS VENUE TRANSFER MOTION.

State ex rel. Vee-Jay Contracting Co. v. Neill, 89 S.W.3d 470 (Mo.
banc 2002)

Missouri Supreme Court Rule 51.045

III. RELATORS ARE ENTITLED TO AN ORDER
PROHIBITING RESPONDENT (OR THE CURRENT PRESIDING
JUDGE) FROM TAKING ANY FURTHER ACTION EXCEPT
TRANSFERRING THIS ENTIRE CASE TO ST. LOUIS COUNTY
BECAUSE PURSUANT TO SECTION 355.176.4, RSMo, THE
EXCLUSIVE VENUE FOR THE CLAIMS AGAINST NON-PROFIT
CORPORATION CHRISTIAN HOSPITAL NORTHEAST-NORTHWEST
IS IN ST. LOUIS COUNTY IN THAT IT IS UNDISPUTED THAT THE
ALLEGED CAUSE OF ACTION ACCRUED THERE, ITS PRINCIPAL
PLACE OF BUSINESS WAS AND IS LOCATED THERE AND THE
OFFICE OF ITS REGISTERED AGENT WAS AND IS LOCATED
THERE, AND RESPONDENT THEREFORE, HAD A MINISTERIAL

DUTY UNDER SECTION 476.410, RSMo, AND RULE 51.045 TO
TRANSFER THE ENTIRE CASE TO ST. LOUIS COUNTY.

State ex rel. SSM Health Care St. Louis v. Neill, 78 S.W.3d 140 (Mo.
banc 2002)

§ 355.176.4, RSMo

§ 476.410, RSMo

Missouri Supreme Court Rule 51.045

ARGUMENT

I. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT (OR THE CURRENT PRESIDING JUDGE) FROM TAKING ANY FURTHER ACTION EXCEPT TRANSFERRING THIS ENTIRE CASE TO ST. LOUIS COUNTY BECAUSE RELATORS PROPERLY RAISED IMPROPER VENUE UNDER RULE 51.045 IN THAT: (1) RELATORS RAISED IMPROPER VENUE AT THE EARLIEST OPPORTUNITY, THEREBY PRESERVING THEIR OBJECTION; AND (2) RESPONDENT, AFTER IMPOSING ON RELATORS THE BURDEN OF DISPROVING THE BASIS FOR VENUE IN THE CITY OF ST. LOUIS, ERRED IN DENYING RELATORS THE OPPORTUNITY TO SUPPLEMENT THE RECORD IN SUPPORT OF THEIR VENUE TRANSFER MOTIONS.

A. Standard for Issuance of a Remedial Writ

A writ of prohibition will be issued only to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power. *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140, 142 (Mo. banc 2002). Because improper venue is a fundamental defect, a court that acts when venue is improper acts

in excess of its jurisdiction, and prohibition lies to bar the trial court from taking any further action, except to transfer the case to a proper venue. *Id.*

B. Respondent erroneously ruled that, as a matter of law, Christian Hospital failed to properly raise venue and had waived the issue of improper venue in that the record reflects that Relators in fact did timely raise improper venue.

In her Brief, Respondent erroneously relies on *State ex rel. Bierman v. Neill*, 90 S.W.3d 464 (Mo. banc 2002), for the proposition that Christian Hospital has waived any argument that venue is improper under § 355.176.4. (Respondent's Brief, pages 18-19). This Court's opinion in *Bierman*, however, had nothing to do with waiver by a defendant of improper venue, but rather of a plaintiff waiving any requirement that defendant disprove bases of venue not specifically pled by the plaintiff. *Id.* at 465.

In *Bierman*, the plaintiff originally brought a medical malpractice suit in St. Louis City against a single defendant, who was a resident of the State of California. 90 S.W.3d at 464. Five days later, plaintiff added as defendants two St. Louis County residents, and those defendants timely filed a motion to transfer venue to St. Louis County on the ground of pretensive non-joinder. *Id.* The Honorable Margaret M. Neill denied the motion, but thereafter, in light of this Court's decision in *State ex rel. Linthicum v.*

Calvin, 57 S.W.3d 855 (Mo. banc 2001), defendants asked Judge Neill to reconsider her previous order. *Id.* Judge Neill denied defendants' motion to reconsider on the basis that defendants had failed to adduce certain evidence at the original, pre-*Linthicum* hearing to carry their burden under a venue statute different from that pleaded by plaintiffs. Judge Neill took this action despite the defendants having submitted with the motion for reconsideration un rebutted affidavits establishing that the cause of action accrued not in St. Louis City, but in St. Louis County. *Id.* at 464-65. In holding that Respondent erred in denying defendants' motion to reconsider, this Court noted that defendants were not obligated to prove venue improper under statutes not pleaded by plaintiff as a basis for venue. *Id.* at 465.

Thus, *Bierman* stands for the proposition that once plaintiff has pleaded venue is proper under a particular statute, or not pleaded venue at all, defendant does not have to disprove all other possible bases for venue. Unlike Respondent's reading of the case, *Bierman* is a waiver of proof case; i.e., by relying on a particular venue statute, the plaintiff waived any requirement that defendant prove venue improper under other statutes, much like a party waives proof of a fact by making an admission of that fact.

In this case, the only basis for venue in the City of St. Louis that was pleaded in Plaintiffs' petition was that BJC is licensed to conduct business in

the City of St. Louis, and that BJC and Christian had an affiliation agreement. (Exhibit 1). At the same time, however, Plaintiffs' petition on its face indicated that the defendants were to be served through their registered agents, all of which were in St. Louis County. (Exhibit 1, caption). In addition, the court file indicated that all of the Defendants were actually served with the petition in St. Louis County. (Exhibit 2-8 for proofs of service). Since Christian was arguing venue was improper in the City of St. Louis based upon § 508.010, Christian did not need to provide any additional proof, since the Plaintiffs' petition and the court file itself attested to the fact that the defendants were residents of St. Louis County for purposes of venue under § 508.010. Thus, Respondent's argument that Christian Hospital's initial venue motion lacked adequate support fails. (Respondent's Brief, pages 20-22).

Here, like in *Bierman*, Relators sought to supplement the record and amend the venue transfer motions in light of *SSM Health Care v. Neill*, decided in June 2002. As was the case in *Bierman*, Relators should have been allowed to supplement the record and amend their motions to address the additional burden placed on them by Respondent and to re-assert the non-profit venue statute as a basis for improper venue in the City of St. Louis. Christian's initial Motion to Reconsider, filed July 3, 2001, was an

effort to supplement the record to provide the proof Respondent deemed that Christian had failed to earlier produce. In Respondent's second ruling on venue dated July 19, 2001, however, she again ruled that Christian had failed in its burden of proof and persuasion, stated that Christian's request to supplement the record was without merit, and denied it.

C. Relator BJC did not waive venue by filing their venue transfer motion in the alternative with a motion to dismiss.

Respondent contends that BJC waived venue by virtue of filing their venue transfer motion in the form of a motion to dismiss or, in the alternative, to transfer. (Respondent's Brief, page 22-23). In effect, Respondent argues that the order in which the paragraphs of the motion are written (with the paragraph stating that the case must be dismissed for failure to file a reviewer's affidavit under § 538.225, RSMo coming before the paragraph asserting venue is improper), constitutes a waiver of venue because, according to Respondent, this constitutes taking of steps relating to the merits of the case before the objection to venue is presented.

Respondent's unsupported argument in this regard, however, ignores that the Missouri civil procedure laws and rules contemplate alternative pleadings and motions. Rule 51.045 simply states that a venue transfer motion must be filed within the time allowed for responding to an adverse

party's pleading. Rule 55.27 lists several motions that must also be filed within the time allowed for responding to the opposing party's pleading. Rule 55.27(a). There is no rule that prohibits a venue transfer motion from being joined with any other motion or that states a joinder of such motion results in a waiver of improper venue. In fact, Rule 55.27(f) specifically contemplates consolidation of motions. *See also* Rule 55.10 (which allows pleading in the alternative regardless of consistency). Respondent's contention of waiver in this regard, therefore, lacks merit.

II. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT (OR THE CURRENT PRESIDING JUDGE) FROM TAKING ANY FURTHER ACTION EXCEPT TRANSFERRING THIS ENTIRE CASE TO ST. LOUIS COUNTY BECAUSE RESPONDENT EXCEEDED HER JURISDICTION AND ABUSED HER DISCRETION IN THAT SHE UNJUSTLY APPLIED RULE 51.045 BY PERMITTING PLAINTIFFS TO FILE UNTIMELY REPLIES TO RELATORS' VENUE TRANSFER MOTIONS WHILE AT THE SAME TIME DENYING CHRISTIAN HOSPITAL THE OPPORTUNITY TO AMEND ITS VENUE TRANSFER MOTION.

A. Standard for Issuance of a Remedial Writ

A writ of prohibition will be issued only to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power. *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140, 142 (Mo. banc 2002). Because improper venue is a fundamental defect, a court that acts when venue is improper acts in excess of its jurisdiction, and prohibition lies to bar the trial court from taking any further action, except to transfer the case to a proper venue. *Id.*

B. Respondent erroneously denied Christian Hospital the opportunity to amend its venue transfer motion while permitting Plaintiffs – tacitly or otherwise – to file untimely replies to Relators’ venue transfer motions.

Respondent argues that Relators’ second point relied on is not properly before this Court in that Christian Hospital’s motion to file an amended venue transfer motion (Exhibit 21) did not allege that Plaintiffs had filed out of time replies to the initial venue transfer motion and Relators have now somehow waived that issue. (Respondent’s Brief, page 26). Respondent, however, seeks to impose an obligation on Relators that simply does not exist under the law.

Rule 51.045 is clear on this point. “Within ten days after the filing of a motion to transfer for improper venue, an opposing party may file a reply denying the allegation in the motion to transfer.... If the issue is determined in favor of the movant *or if no reply is filed*, a transfer of venue shall be ordered to a court where venue is proper.” Rule 51.045(b) (emphasis added); *see also State ex rel. Vee-Jay Contracting Co. v. Neill*, 89 S.W.3d 470 (Mo. banc 2002) (holding that a judge must transfer venue if the opposing party does not reply to a proper motion to transfer venue).

Thus, by not transferring venue at the expiration of the ten days, Respondent either ignored Rule 51.045 or she tacitly granted Plaintiffs leave to file the reply to the venue transfer motions out of time. Respondent's January 21, 2003, Order denied Relators the opportunity to amend and supplement their venue motions, holding that Rule 51.045 "contains no provision for successive or supplemental pleadings." (Exhibit 23, page 3). At the same time, however, Respondent allowed Plaintiffs to file their replies to the Defendants' venue transfer motions out of time and without leave of court¹, despite language in Rule 51.045 requiring a plaintiff to file a

¹ Respondent contends that the precise day for response under Rule 51.045 cannot be determined because the copy of Christian Hospital's venue transfer motion filed with this Court as Exhibit 10 does not contain a certificate of service. (Respondent's Brief, page 27). However, this was an inadvertent omission from the supporting exhibits. Attached is a certified copy of the motion as filed with the Circuit Clerk's office which shows a certificate of service attesting that the motion was mailed, postage prepaid, on March 22, 2003. Including three days for mailing, plaintiffs' reply would have been due no later than April 4, 2001. According to the certificate of service on plaintiffs' reply, it was mailed to the parties on April 9, 2001

reply within ten days. Since Plaintiffs did not seek leave of court to file the replies and no order granting leave was entered, one must infer that Respondent implicitly granted Plaintiffs leave to file the replies out of time because she did not hold that Plaintiffs had waived their arguments on proper venue by not timely filing the replies.

All of the defendants in this case raised improper venue by motion in their first pleadings, and venue has been vigorously contested throughout the course of this litigation. The petition herein makes no reference to any act of negligence occurring in the City of St. Louis, and Plaintiffs even admit that the cause of action did not accrue in the City. (Exhibits 12, 13). Plaintiffs served each of the defendants, including Christian, personally and/or through their registered agents in St. Louis County. None of the parties – including Plaintiffs -- contest the fact that Christian's principal place of business is on Dunn Road in St. Louis County or that it is a non profit corporation.

Respondent contends that Relators waited too long to raise venue and that Christian Hospital is guilty of laches. (Respondent's Brief, pages 24-25). The record, however, shows a long, protracted, and repeated effort to assert improper venue, and the doctrine of laches is, therefore, inapplicable.

(Exhibit 12), and the court's docket sheet reflects that it was entered into the court's computer system on April 11, 2001. (Exhibit 9).

“Mere delay does not of itself constitute laches; the delay involved must work to the disadvantage and prejudice of the [opposing party]. Where no one has been harmed in any legal sense, and the situation has not materially changed, the delay is not fatal.” *See Hagely v. Board of Educ. of Webster Groves School Dist.*, 841 S.W.2d 663, 669-70 (Mo. banc 1992). Here, Plaintiffs have not been prejudiced. They have been able to conduct discovery (to the extent that they have chosen to) and no one has contended that a transfer to St. Louis County would significantly delay a trial of this case. Moreover, plaintiffs themselves admitted that venue in this case is governed by § 355.176.4, so Christian Hospital’s amended motion did not change or challenge what plaintiffs had already admitted. *E.g., Grieshaber v. Grieshaber*, 793 S.W.2d 161, 163 (Mo. App. E.D. 1990) (holding that evidence that would support laches can include (1) a loss of evidence that would support a party’s position, and (2) a change of position in a way that would not have occurred but for the delay).

Here, Respondent’s first order denying venue transfer was entered just four months after the petition was filed. As a practical matter, resolution of the venue question in this case has been delayed as a result of Respondent’s repeated refusal to accept from Relators proof of matters about which there was and is no dispute. If Respondent had allowed Relators to

supplement and amend their venue motions, particularly in light of Respondent's acceptance of Plaintiffs' untimely replies, Respondent could have ruled on the merits of the issue, and transferred the case to the appropriate venue long ago.

III. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT (OR THE CURRENT PRESIDING JUDGE) FROM TAKING ANY FURTHER ACTION EXCEPT TRANSFERRING THIS ENTIRE CASE TO ST. LOUIS COUNTY BECAUSE PURSUANT TO SECTION 355.176.4, RSMo, THE EXCLUSIVE VENUE FOR THE CLAIMS AGAINST NON-PROFIT CORPORATION CHRISTIAN HOSPITAL NORTHEAST-NORTHWEST IS IN ST. LOUIS COUNTY IN THAT IT IS UNDISPUTED THAT THE ALLEGED CAUSE OF ACTION ACCRUED THERE, ITS PRINCIPAL PLACE OF BUSINESS WAS AND IS LOCATED THERE AND THE OFFICE OF ITS REGISTERED AGENT WAS AND IS LOCATED THERE, AND RESPONDENT THEREFORE, HAD A MINISTERIAL DUTY UNDER SECTION 476.410, RSMo, AND RULE 51.045 TO TRANSFER THE ENTIRE CASE TO ST. LOUIS COUNTY.

A. Standard for Issuance of a Remedial Writ

A writ of prohibition will be issued only to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power. *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140, 142 (Mo. banc 2002). Because improper

venue is a fundamental defect, a court that acts when venue is improper acts in excess of its jurisdiction, and prohibition lies to bar the trial court from taking any further action, except to transfer the case to a proper venue. *Id.*

B. St. Louis County is the only proper venue for claims against Christian Hospital.

In her Brief, Respondent argues that venue as to allegedly jointly liable BJC is venue as to Christian Hospital. (Respondent's Brief, pages 29-32). As a nonprofit corporation, and pursuant to § 355.176.4, RSMo, however, Christian Hospital can be sued *only* in one of the following three locations: (1) the county in which the nonprofit corporation maintains its principal place of business; (2) the county where the cause of action accrued; and (3) the county where the office of the registered agent for the nonprofit corporation is located. *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140 (Mo. banc 2002); *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 145 (Mo. banc 2002).

Here, the *only* venue proper for all defendants and improper as to none is St. Louis County. Pursuant to § 355.176.4, the Circuit Court of St. Louis County is the exclusive venue within which Christian Hospital can be sued. Furthermore, Relator BJC is a Missouri nonprofit corporation with its registered agent in St. Louis County and the alleged cause of action against

it, if any, accrued at Christian Hospital, which is only located in St. Louis County. (See Exhibits 1, 15). Thus, the only proper venue for both of these nonprofit corporations is in St. Louis County. Accordingly, Respondent erroneously failed to discharge her ministerial duty to transfer the entire case, and the writ of prohibition should be made absolute.

Boiled down, Respondent's argument is that, although this Court in *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140 (Mo. banc 2002), has identified § 355.176.4 as providing the exclusive venues for suits against a nonprofit corporation, Defendant BJC's presence in the City of St. Louis as an allegedly jointly liable defendant trumps Christian Hospital's venue rights under that statute. As is evident from her Brief, Respondent's support for this argument comes from a misplaced reliance on § 508.040 and § 508.050 and cases interpreting those statutes. Further, Respondent's argument ignores long standing Missouri law that venue is a personal privilege of a defendant granted by statute. *Bizzell v. Kodner Dev. Corp.*, 700 S.W.2d 819, 822 (Mo. banc 1985).

Respondent's reliance on § 508.040 is misplaced. As this Court has noted, "[w]hile [an] analogy to the interpretation of section 508.040 is appealing at first blush, it fails to sufficiently take into account the difference in wording between section 508.040 and section 355.176.4." *SSM Health*

Care, 78 S.W.3d at 144. Section 508.040 provides that “[s]uits against corporations ***shall be commenced...***” in one of two locations. Section 508.040 (emphasis added). Section 355.176.4, by contrast, expressly states that “[s]uits against a nonprofit corporation ***shall be commenced only*** in one of” three locations. Section 355.176.4 (emphasis added).

In *SSM Health Care v. Neill*, this Court made two important holdings that are directly applicable to the facts of this matter. First, the Court noted that § 355.176.4 governs venue in suits in which a nonprofit corporation is sued alone or with other nonprofit corporate defendants. 78 S.W.3d at 143. Second, this Court held that “the legislature’s use and placement of *both* the words ‘shall’ and ‘only’ in section 355.176.4 signifies on its face that the legislature intended to designate **exclusively** those locations set out in section 355.176.4 as permissible venues for suit against nonprofit corporations, and **restrict** venue to them...” 78 S.W.3d at 143 (emphasis to “both” in original, remaining emphasis added). What is clear from the *SSM Health Care* holdings, therefore, is that § 355.176.4, unlike § 508.040, is a restricting or limiting venue statute, designed to specifically identify the only three permissible venues for suits against a nonprofit.

Respondent, by contrast, cites to cases interpreting § 508.040 to support the erroneous conclusion that venue as to one nonprofit corporation

is venue as to all nonprofit corporations. Respondent's conclusion, however, completely ignores the plain differences in the language of § 355.176.4 and this Court's interpretation of that language. "Section 355.176.4 expressly provides the **exclusive venues in which a nonprofit can be sued in Missouri.**" 78 S.W.3d at 145.

Respondent also erroneously relies on § 508.050 (the municipal corporation venue statute) and cases interpreting that statute. Section 508.050 provides in pertinent part that "[s]uits against municipal corporations as defendant or co-defendant shall be commenced only in the county in which the municipal corporation is situated." § 508.050, RSMO. No doubt, that statute is unwittingly framed to create a unique venue impasse, but likely only when claims against two municipal corporations situated in different counties are involved. E.g. *State ex rel. City of Springfield v. Barker*, 755 S.W.2d 731, 734 (Mo. App. S.D. 1988) (holding that where two municipal corporations of different counties were defendants in one action, action could be commenced in either county in which a defendant municipal corporation was situated, creating an exception to § 508.050 which provides that suits against municipal corporations shall be commenced only in county in which municipal corporation is situated). That is simply because the applicable venue statute has only one authorized

location, which is the county where the municipal corporation is located.

Thus, when two municipal corporations are properly sued in the same action, one municipal corporation will necessarily have to yield to the other.

Barker, supra, at 734. The fact remains, though, that this scenario is not involved in the case at bar because St. Louis County provides a proper venue for all defendants.

Respondent tries to create a “venue impasse” here by raising the hypothetical question of a case where two nonprofit corporations could not be joined in a single lawsuit under § 355.176.4. (Respondent’s Brief, page 32). It is undisputed, however, that those are not the facts of this case, and Respondent’s argument in this regard amounts to nothing more than a request for an advisory opinion; something this Court has said it cannot and will not deliver. *State ex rel. Ellsworth Freight Lines, Inc. v. State Tax Commission of Mo.*, 651 S.W.2d 130, 132 (Mo. banc 1983); *In re Estate of Van Cleave*, 574 S.W.2d 375, 376 (Mo. banc 1978).

Here, the exclusive venue within which Christian Hospital can be sued, St. Louis County, is also a proper venue under § 355.176.4 for BJC Health System. A transfer of the entire case to St. Louis County does not mean that venue has been analyzed separately for each allegedly jointly liable Defendant, but rather that venue is being analyzed *consistently* for all

such Defendants. The law mandates that, if possible, Respondent simply transfer the entire case to a venue that is proper as to all defendants. Rule 51.045; § 476.410, RSMo. In this case, that venue is St. Louis County.

C. Respondent’s “Remedies” request is unsupported and unprecedented under Missouri law.

Respondent’s fourth point relied on is simply stated “Remedies” and asks this Court, should it decide that proper venue of this action is in St. Louis County, to allow Plaintiffs to dismiss their action as to Christian Hospital and proceed to trial in the City of St. Louis against the remaining defendants. (Respondent’s Brief, page 33). In effect, Plaintiffs are asking this Court to save them from having to take their one voluntary dismissal under Rule 67.02. (Respondent’s Brief, page 33, “This would obviate the plaintiffs’ right to voluntarily dismiss the entire case and re-file it in the City of St. Louis as to the remaining defendants.”). This request is ridiculous.

Even assuming that this Court accommodates plaintiffs’ request and allows them to voluntarily dismiss Christian Hospital, the dismissal would make no difference to the outcome because venue is determined as the case stands when brought. *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820, 823 (Mo. banc 1994) (holding that the dismissal of a defendant did not change the location of proper venue of action as determined by party

composition at the time suit is brought, even though if action had been filed without naming said defendant, venue might have been proper in a different location); *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 858 (Mo. banc 2001) (noting that *State ex rel. DePaul Health Ctr. v. Mummert* still applies whenever a defendant is dismissed from a lawsuit). Thus, even if dismissed, Christian Hospital was still a party when the action was brought and venue is still improper in the City of St. Louis.

CONCLUSION

Relators Christian Hospital Northeast-Northwest and BJC Health System request that this Court make absolute its Preliminary Writ of Prohibition, thereby precluding Respondent (or the current presiding judge for the Circuit Court for the City of St. Louis) from taking any further action, other than to transfer the entire case to the Circuit Court for St. Louis County, where venue is proper as to all defendants, and to grant such other and further relief as this Court deems just and proper.

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CERTIFICATE OF COMPLIANCE WITH
MISSOURI SUPREME COURT RULE 84.06(b) AND RULE 84.06(g)

The undersigned certifies that the foregoing Reply Brief complies with the limitations contained in Missouri Supreme Court 84.06(b) and, according to the word count function on Microsoft Word 2000 by which it was prepared, contains 5,068 words of proportional type, exclusive of the cover, Certificate of Service, this Certificate of Compliance, the signature block, and the appendix. Microsoft Word 2000 was used to prepare Relators' Reply Brief.

The undersigned further certifies that the diskette filed herewith containing the Brief in electronic form complies with Supreme Court Rule 84.06(g) and that it has been scanned for viruses and is virus-free.

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The undersigned hereby certifies that a copy of the foregoing Reply Brief and Appendix and a 3-1/2 inch diskette containing Relators' Reply Brief were mailed, postage pre-paid this 5th day of September 2003, to:

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APPENDIX

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Certified Copy of Christian Hospital's Motion to Dismiss or
to Transfer for Improper Venue

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